



STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

TELECOMMUNICATIONS

IN THE MATTER OF THE PETITION OF)
XO COMMUNICATIONS OF NEW)
JERSEY, INC., FOR ARBITRATION OF AN)
INTERCONNECTION AGREEMENT WITH) ORDER DENYING MOTION TO
THE UNITED TELEPHONE COMPANY) DISMISS
D/B/A SPRINT OF NEW JERSEY)
PURSUANT TO SECTION 252(B) OF THE)
TELECOMMUNICATIONS ACT OF 1996) DOCKET NO. TO03050424

(SERVICE LIST ATTACHED)

BY THE BOARD:

The Telecommunications Act of 1996 ("the Act"), P.L. 104, 110 Stat.56 (codified in scattered sections of 47 U.S.C. §151 et seq.), set forth a national policy framework which established a competitive and deregulated telecommunications environment. The Act imposes on incumbent local exchange carriers ("ILECs") the duty to negotiate in good faith the terms and conditions of agreements to fulfill their obligations under the Act, including, but not limited to, their duties to provide interconnection, unbundled access, resale, collocation of facilities, number portability, dialing parity, access to rights of way and reciprocal compensation. 47 U.S.C. §251 et seq. Pursuant to the Act, Congress delegated to the states the responsibility to resolve disputes regarding terms and conditions of interconnection agreements between telecommunication providers through mediation and arbitration, and to review and approve or reject such negotiated or arbitrated interconnection agreements. 47 U.S.C. §252(e)(1).

By letter dated May 28, 2003, XO Communications of New Jersey, Inc. ("XO") filed a petition for arbitration regarding an interconnection agreement between XO and United Telephone, d/b/a Sprint of New Jersey ("Sprint"). The cover letter accompanying the petition was signed by counsel from a firm in Boston, Massachusetts, and noted that a motion for appearance pro hac vice was included with the filing pursuant to N.J.A.C. 1:1-5.2 and R. 1:21-2. This motion for

admission pro hac vice and certification noted that the attorney seeking admission pro hac vice is associated in the firm with counsel of record licensed to practice in New Jersey. By letter dated June 4, 2003, XO filed a letter identifying the firm of Carella, Byrne, Bain, Gilfillan, Cecchi, Steward & Olstein, as New Jersey attorneys on behalf of XO.

By letter dated June 30, 2003, Sprint filed a motion to dismiss the petition for arbitration filed by XO on the grounds that the petition was filed after the 160th day following a request by XO for negotiation and, therefore, not filed in accordance with Section 252 of the Act or the Board's procedures for implementation of Section 252. According to Sprint, although the XO petition was dated May 28, 2003, it was submitted by counsel from Boston, Massachusetts, with only an indication in the cover letter that another attorney on the petition is licensed in New Jersey. Thereafter, in a letter dated June 4, 2003, a New Jersey firm entered an appearance before the Board on behalf of XO. Therefore, Sprint argues that the earliest that the XO filing with the Board was "complete" would be June 5, 2003. According to Sprint, even if the Board were to dismiss the petition as requested by Sprint, XO would have remedies available, such as submitting a new negotiation request to Sprint, and if the issues remain unresolved, filing another request for arbitration with the Board.

By letter dated July 10, 2003, XO filed a response to Sprint's motion to dismiss. According to XO, the petition was received within the timeframe established in the Act and an attorney licensed and in good standing at the New Jersey bar was identified on the petition. XO asserts that the initial filing dated May 28, 2003, filed on May 29, 2003, complied in all material respects with the federal and State requirements.

DISCUSSION

The Board has carefully considered and reviewed the arguments presented with regard to the motion to dismiss the petition for arbitration and arguments presented in opposition to the motion.

Relevant to our review, 47 U.S.C. §252(b)(1) provides that "[d]uring the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." Furthermore, the Act requires that with the filing of the petition, the party is required to provide the State commission and the other parties with documentation concerning unresolved issues, the position of each of the parties, and information about the other issues which may have been resolved by the parties. 47 U.S.C. §252(b)(2).

According to the facts contained in the petition for arbitration filed by XO, it made its request for negotiations under the Act on December 20, 2002. The 160th day following the request for negotiations would therefore be May 29, 2003. The petition that XO filed with the Board was dated May 28, 2003 and filed on May 29, 2003. The rules established by the Board for implementation of §252 of the Act require that petitions and responses must comply with 47 U.S.C. §252(b)(2) and §252(b)(3) respectively. Order, In the Matter of the Board's Consideration of Procedures for the Implementation of Section 252 of the Telecommunications Act of 1996, Docket No. TX96070540 (August 15, 1996), Appendix A, page 3. Such petitions and responses must be filed with the Board, with copies to all parties, and others, including the Division of the Ratepayer Advocate. Ibid.

In the instant matter, XO served its petition on the proper parties by filing its petition for arbitration dated May 28, 2003 with the Board and sending copies of such petition to the relevant parties, including Sprint. Sprint does not allege that it did not receive the petition on May 28, 2003, and it acknowledges that May 29, 2003 constitutes the 160th day following the request for negotiations in this matter. Nor does Sprint allege any substantive or procedural harm resulting from the curing of the failure by XO to list local counsel in its original submission. Finally, Sprint does not allege that the filing violated the requirements of the federal Act with regard to the procedures set forth therein for requesting arbitration. As noted in the submissions, XO soon after cured the alleged filing

defect at the Board by filing a notice of appearance by local counsel, namely Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein, P.C., by letter dated June 4, 2003.

The rules of practice governing conduct and procedure before the Board allow some flexibility such that “[p]leadings will be liberally construed with the view to effect justice.” N.J.A.C. 14:1-4.4. Furthermore, “[t]he Board may disregard errors or defects in pleadings which do not affect the substantial rights of the parties. However, if the defect in a pleading prejudices a substantial right of any party the Board may, on notice, strike the pleading or take such other action as it deems appropriate.” Ibid. As noted above, the filing by XO complied with the substantive requirements of the federal Act, Sprint does not allege that it failed to receive a copy of the petition for arbitration by the 160th day following the request for negotiation, nor can it allege that it had no notice of the filing by the 160th day. Thus, Sprint had received notice by the 160th day that XO sought the assistance of the Board in arbitration in accordance with the procedures set forth in the Act. The alleged error or defect in filing concerns the proper manner of filing at the Board in accordance with State law and regulation. XO expeditiously corrected such error by filing a notice of appearance of local counsel within days of the filing the petition for arbitration at the Board. Dismissing the petition, leaving XO with the remedies outlined by Sprint (having XO request another negotiation with Sprint for the same issues that remain unresolved, then file another petition with the Board for examination of these same issues), would be inconsistent with the goals of promoting competition and would result in further delay in the resolution of the underlying interconnection agreement.

Under the circumstances of this case, where a petition for arbitration had been filed in accordance with the federal requirements such that the Sprint was properly put on notice as to the request for arbitration, and where the failure of XO to provide a notice of appearance for local counsel with its filing at the Board was cured expeditiously, the substantial rights of the parties have not been prejudiced.¹

¹ According to the Uniform Administrative Procedure Rules, except in limited (here inapplicable) circumstances, in the context of contested matters, a corporation must be represented by an attorney. N.J.A.C. 1:1-5.1. Furthermore, the New Jersey Court Rules require that to appear in court in this State, among other conditions, one must be an attorney admitted to the New Jersey bar maintaining a bona fide office for the practice of law in New Jersey. R. 1:21-1(a). Although the original filing of XO included a motion for pro hac vice admission which referenced a New Jersey licensed attorney, that attorney is associated with the Boston firm which submitted the petition, and thus, it appears that he does not practice law in New Jersey or have a bona fide office in New Jersey. Because XO now has retained New Jersey counsel to represent it in this matter, no outstanding issue remains with regard to representation by local counsel in the arbitration.

The Board HEREBY FINDS that the May 28, 2003 filing by XO was within the statutory time period established by the federal guidelines and that any deficiencies as to filing manner were cured expeditiously following the filing without prejudicing a substantial right of any party. Therefore, the Board DENIES the motion to dismiss filed by Sprint.

DATED: 8/07/03

BOARD OF PUBLIC UTILITIES
BY:

(signed)
JEANNE M. FOX
PRESIDENT

(signed)
FREDERICK F. BUTLER
COMMISSIONER

(signed)
CAROL J. MURPHY
COMMISSIONER

(signed)
CONNIE O. HUGHES
COMMISSIONER

(signed)
JACK ALTER
COMMISSIONER

ATTEST:

(signed)
KRISTI IZZO
SECRETARY